General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO *and* W.S. Darley & Company. Case 18–CB–4111–1

July 31, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On September 23, 2002, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Eau Claire, Wisconsin, its officers, agents, and representatives, shall take the action set forth in the Order.

Timothy B. Kohls, for the General Counsel.
Scott D. Soldon and *Nathan D. Eisenberg* (*Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.*), of Milwaukee, Wisconsin, for the Respondent.
Gary A. Marsack (*Lindner & Marsack, S.C.*), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on March 6, 2002. On July 17, 2001, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on April 2, 2001, alleging violation of Section 8(b)(3) and 8(d) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs that have been filed, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

The lone alleged unfair labor practice in this case is that a labor organization has refused to execute a written collective-bargaining contract, embodying a full and complete agreement that it reached with an employer whose employees that labor organization represents. For the reasons set forth in section II, infra, I conclude that a preponderance of the evidence supports that allegation.

At all times material the Employer, W. S. Darley & Company, has been an Illinois corporation with an office and places of business in Chippewa Falls, Wisconsin, where it engages in manufacturing fire assemble pumps and fire trucks. It is admitted that at all material times the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. That ultimate admission is based upon the underlying admitted allegations that, in conducting those business operations during calendar year 2000, the Employer purchased materials and services valued in excess of $50,000 which it received at its Chippewa Falls facilities directly from points outside of the State of Wisconsin.

At Chippewa Falls, the Employer operates two divisions: an apparatus division in which employees assemble fire trucks and, secondly, a pump division in which employees asssemble water-type pumps for fire trucks, ships, etc. At all material times, employees of both divisions have been represented by Respondent—General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO, a labor organization within the meaning of Section 2(5) of the Act—in a single appropriate bargaining unit: All regular full-time and regular part-time production and maintenance employees employed by the Employer at its Chippewa Falls, Wisconsin facilities; excluding managerial employees, professional employees, office clerical employees, guards and supervisors as defined by the Act.

Respondent and the Employer had been parties to a collective-bargaining contract scheduled to expire on May 31, 2000.[1] During mid-May they commenced negotiations for a successive contract. The Employer was represented by Attorney Gary A. Marsack. Chief negotiator for Respondent at that point was its business agent, James William Dawson, an admitted agent of Respondent within the meaning of Section 2(13) of the Act. Also part of Respondent's negotiating committee were four of the Employer's employees: Brian Mawby, John Fransway, Ken Schnick, and Ed Wannish. As will be seen, those four employees played a significant role during the negotiations and particularly during the events of October 3–4 that culminated in a final agreement between the parties on terms for a collective-bargaining contract.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that the Respondent's argument that "Miscellaneous Item" 3 was an illegal subject of bargaining was not raised before the judge.

[1] Unless stated otherwise, all dates occurred during 2000.

Approximately 16 negotiating sessions were conducted. The final one began midmorning on Tuesday, October 3, and extended through the early morning hours of Wednesday, October 4. By that time, Respondent's secretary-treasurer, James Newell, an admitted agent of Respondent within the meaning of Section 2(13) of the Act, had become involved in the negotiations. He testified that, during a meeting of unit employees conducted prior to commencement of that final negotiating session, some employees had expressed the view that the employee-committee "was not doing its job relative to representing [the bargaining unit's] total interests, that the committee was operating more on its personal agenda instead of representing the total interest of the group." Newell characterized that opinion as "some kind of disinformation," but he had not been involved in the negotiating sessions conducted prior to August 19, when a strike had commenced against the Employer. Business Agent Dawson, who had been involved for Respondent during those earlier negotiating sessions, did not dispute the opinion about the employee-committee, expressed by some of the bargaining unit employees.

The Employer, or at least Marsack, essentially shared the view which some of those unit employees expressed to Newell. Newell testified that, during the October 3–4 bargaining session, Marsack had "talked about the . . . first month or six weeks . . . the first few meetings of the bargain [sic], this kind of hostility [on the part of the employee-committee] as he terms it had to be massaged and worked around even to get to . . . some constructive bargaining . . . ." So far as the evidence shows, Dawson never contested that opinion when expressed by Marsack during the October 3–4 bargaining session. Moreover, Dawson never testified that the employee-committee had not, during the early bargaining sessions, displayed hostility that had some adverse effect on "constructive bargaining."

With regard to the course of bargaining prior to October, the parties agreed to extend the then-existing collective-bargaining contract until June 30 or July 1, to enable them to attempt to reach agreement before that contract expired. That attempt was not successful. The Employer made a last and final offer. During July, a majority of the bargaining unit employees voted not to accept it. A strike began on August 19. The Employer subcontracted assembly of some fire trucks, work that ordinarily would have been performed by unit employees. No one contends that it violated the Act by having done so. In addition, seven unit employees chose either not to go on strike at all or, alternatively, went on strike but then abandoned the strike and returned to work. Four of those employees—denominated "crossovers" in the record—were apparatus division employees who were less senior than four of the apparatus division employees then still on strike. As will be seen, that comparative seniority created a significant subject for bargaining. In fact, it formed the one-half of a quid pro quo agreement on October 4, with the future role of the four employee-committee members being the other half of that agreement.

As set forth above, the parties began what would become their final bargaining session during midmorning on October 3. Present for Respondent were Newell, Dawson, and the four employee-committee members. Also present was Fred Gegare. By amendment to the complaint, it is alleged that Gegare had been an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent denies that allegation. As it turns out, the dispute is not one of particular consequence, given Newell's admissions that Respondent did agree on all terms for a contract on October 4. Still, given the disputed allegation, completeness requires some explanation of Gegare's role during the October 3–4 bargaining session.

In the end, it cannot be said that Gegare had been Respondent's agent for all purposes, nor for other than during the October 3–4 bargaining session. He is not an officer or employee of Respondent. According to Newell, Gegare is secretary-treasurer of General Teamsters Union Local 75 in Green Bay, Wisconsin. He also is president of Teamsters Joint Council 39, of which apparently all Wisconsin Teamsters local unions are members. Finally, he is a vice president of International Brotherhood of Teamsters, AFL–CIO.

Gegare participated in the October 3–4 bargaining session as a member of Respondent's bargaining team. "Mr. Gegare was there at my personal request to give some assistance to the situation and hopefully break some of the logjams," Secretary-Treasurer Newell testified: "Predominately because I felt that the temperature so to speak at the bargaining table had gotten a little too hot for . . . . reasonable perspectives from either side and I felt that Mr. Gegare if he came in given his experience as well as his status as an international vice president in particular that he might be able to. . . . kind of cool things down and get people refocused." Now, that testimony does not show that Gegare had been acting in some sort of neutral mediator's position. That role was being filled by Federal Mediation and Conciliation Service Mediator William Danielson. It was under his auspices that the October 3–4 bargaining session was being conducted. There is no evidence that the Employer had ever agreed to Gegare's participation in that bargaining session, much less that he could serve as a neutral mediator during it. To the contrary, Business Agent Dawson admitted that, "Brother Newell and Brother Gegare were representing Local 662 at meetings with the company" that began on October 3. Therefore, for the duration of that bargaining session, Gegare had been an agent of Respondent within the meaning of Section 2(13) of the Act.

Most of what occurred at that final bargaining session is subordinate to the ultimate issue presented here. As October 3 progressed into the early morning of October 4, the parties—whose bargaining committees were being sequestered in separate rooms by Mediator Danielson, but whose primary representatives sometimes met together—reached final agreement on disputed issue after disputed issue. In the end, the principal remaining open issue was the status of four crossovers in the apparatus division and four more senior strikers whose jobs were in that same division. Given the above-mentioned subcontracting of work in that division, there was insufficient work for more than four employees in the apparatus division. Respondent insisted that the four more senior apparatus division strikers return to work; the Employer was unwilling to lay off the four crossovers to make room for the four more senior strikers. By the beginning of October 4, that was the one dispute that remained for resolution.

To resolve that dispute, Marsack proposed, during a private meeting with Newell and Gegare, that the Employer provide some sort of work for all eight apparatus division employees—the four more senior strikers and the four crossovers—if Respondent would agree that the four employee-committee members resign from the committee and agree never to hold any union position so long as each remained employed by the Employer. According to Newell, Marsack's proposal regarding the committee had been based upon his above-described view of Mawby, Fransway, Schnick, and Wannish's attitude during early bargaining sessions.

That offer met with initial resistance by Newell and Gegare. However, Newell testified that, "I took myself and Mr. Gegare[,] went out into the hall of this meeting room . . . and I stated to Mr. Gegare that I thought maybe we should reconsider [Marsack's offer] and at least explore it with the committee," given the above-described feelings of some unit members that the employee-committee had been "operating more on its personal agenda instead of representing the total interest of the group." So, Newell and Gegare went to the room where Business Agent Dawson and the four employee-committee members were located. They described Marsack's offer.

According to Newell, the four employees on the committee "were initially very hesitant but after discussion said that they might be . . . inclined to at least consider it but they insisted that they wanted it in writing." Neither Newell nor Dawson, for that matter, ever claimed that any of the four employee-committee members had not understood Marsack's proposal. There is no other evidence showing that any one of the four had not understood what was being proposed. Newell testified that he asked why it was necessary to have that proposal in writing. He further testified that Mawby retorted "that he wanted it in writing so that he could sue Mr. Marsack because he [Mawby] didn't believe the proposal was legal and it would give him something hard that he could go after him with." That remark tends to reinforce the expressed view of some unit employees that the employee-committee had been disregarding group objectives in pursuit of their personal agenda or agendas.

The request for a written proposal was communicated to Marsack, during another separate meeting with Newell and Gegare. Apparently, the employer had a laptop computer on which, as Marsack put it, "a base document which was in contract form" had been recorded prior to the October 3–4 bargaining session. As that session progressed, he testified, that base document was revised as agreements were reached item by item. So, the Employer added to a document entitled "Miscellaneous Items"—one of a total of six separate documents that, collectively, would make up the overall agreement between the parties—the following two items:

> 3. The union bargaining committee agrees to resign their committee positions and agrees further not to run for or hold any union bargaining unit position during the remainder of their employment at the W.S. Darley & Co. The committee will sign individual waivers confirming this agreement.
>
> 4. The company will recall four (4) additional employees in consideration for the agreement outlines [sic] in paragraph 3 above.

That document was then submitted to Newell and Gegare. "I felt that the language accurately reflected what Mr. Marsack" had orally proposed, Newell testified.

The revised miscellaneous items document was taken to the room where Dawson and the employee-committee were situated. What occurred next is of predominant significance to disposition of the ultimate issue in this case. "I explained to them that . . . this act . . . was going to be a voluntary act on their part solely and exclusively for the sake of getting four additional people back off the bench that otherwise would remain on layoff," testified Newell, pointing out that "at least two of them had indicated in previous discussion that they were planning on resigning anyway" from the committee. What next occurred is the subject of some contradiction between Business Agent Dawson and his superior, Secretary-Treasurer Newell. None of the four employee-committee members appeared as witnesses.

According to Dawson, by the end of the night the only decision that had been made was that "we were going to take a look" at Marsack's revised Miscellaneous Items proposal. "I think most of the bargaining committee was willing to take a serious look at it and see if it would be acceptable," but "I don't think any official decision was made on it," he claimed. No question that Dawson was attempting to portray the situation as less than final agreement on miscellaneous items 3 and 4. "I understood it was an option for the committee to take," he testified, "To me that wasn't part of the final offer." That opinion was disputed by Marsack, when he testified. More significantly, Dawson's testimony was contradicted flatly by Newell.

According to Newell, "in the end the committee agreed and said well, I guess, you know, we can live with this and so we went back and we informed Mr. Marsack that in the fact the committee was indicating they could live with it." No question that Newell was testifying that, in fact, all of the employee-committee members had agreed with, most specifically, miscellaneous items 3. "Yes, in essence," he answered, when asked if it was his testimony that "after it came in writing the committee agreed with the language as proposed?" "Yes," he answered, when asked if he had "advised [Marsack] of that agreement?" No equivocation on Newell's part. And, in contrast to Dawson, Newell appeared to be testifying candidly.

Newell did add two caveats to Respondent's final acceptance of the entire agreement. First, he testified that ratification by a majority of the unit employees was needed. Second, he testified that the Employer was "told that we would present the offer again [as had occurred during July] without recommendation" on acceptance or rejection by unit employees.

A ratification meeting was conducted that same day, beginning at 5 p.m. on October 4. The ratification election resulted in 37 unit employees voting for ratification and 31 employees voting against it. But, Respondent chose not to present all of the agreement to the employees. It never presented miscellaneous items 3 and 4 as part of the ratification election. That occurred as a result of changes in mind by two employee-

committee members between the end of the final bargaining session and commencement of the ratification meeting.

Newell testified that 2 p.m. on October 4 he had been in his office, "approximately six to seven miles from the Labor Temple," where the ratification meeting was to be conducted. Members of the employee-committee began arriving, to help him assemble the documents to be presented to the bargaining unit members. When Wannish arrived, testified Newell, he "immediately announced that he was having some second thoughts about the steward resignation factor." According to Newell, Wannish said that he had contacted the Board's Regional Office and someone had promised to send charge forms, saying "that the [U]nion had better be pretty careful about presenting any such thing to the membership," as the resignation agreement portion of the overall agreement. Newell further testified that Schnick arrived and, overhearing some of what Wannish was saying, also "started indicating some wavering himself."

Spooked by what those two employees were saying, Newell telephoned counsel. He testified that "the meeting was set for 5 p.m." and "I was on the phone with our legal counsel at about 5 to 5 getting final . . . advice from them as to what I should consider in my deliberations and I made a decision at that time that I simply was not going to present" miscellaneous items 3 and 4 during the ratification meeting. And that was the course that he followed during that meeting.

Newell testified that when he arrived at those two items during the meeting, as he was reviewing all the documents, he had told the assembled employees about "the sequence of events relative to trying to figure out whether we legally could do this," and "when you vote I don't want you thinking that you are voting on these two items because you are not." He also testified that he had "apologized to whoever the four people were in the audience that ultimately would not be coming off the bench and coming back to work." As discussed below, it turned out that it was not necessary for Newell to have done that. Those four employees were returned to work by the Employer, consistent with miscellaneous items 4 of the overall agreement.

Respondent gave no notice to the Employer prior to the ratification election that miscellaneous items 3 and 4 would not be presented to the bargaining unit employees. Indeed, there was little opportunity to have done that, given that Newell did not make that decision until minutes before that meeting was scheduled to begin, as described two paragraphs above. Even so, Dawson made some sort of effort to portray that decision as having been communicated to Marsack before the ratification meeting. All he accomplished, in the final analysis, was to bring his own reliability as a witness into further disrepute.

He was asked if it were not "true that [Newell] made that decision [about what the membership would vote on] just at about the time the 5 o'clock meeting opened?" His affirmative answer to that question led to a question about whether his "calls with Mr. Marsack and making some changes or whatever clarifications you were making in the document were made a couple of hours prior to that, isn't that true?" To that question, Dawson answered, "Yes." But, that simply could not have occurred. Newell had not made his decision "a couple of hours prior to" the ratification; he had made it almost simultaneously with the 5 p.m. commencement of that meeting on October 4. There simply had been no "changes or whatever clarifications" about which Marsack could have been notified by Dawson as early as 3 p.m.

In fact, Dawson conceded as much, as his testimony continued. "That's correct," he answered, when asked if his October 4 conversation with Marsack had occurred, "At a time when no decision had yet been made by" Respondent regarding miscellaneous items 3 and 4. And during recross examination, Dawson further conceded that he did not "recall telling" Marsack that "as to these significant issues [Respondent] had contemplations of not providing them to the membership?" In sum, Dawson simply could not have said anything to Marsack on October 4, before the ratification meeting, about Newell's eventual decision not to submit those two aspects of the overall agreement to a ratification vote. His initial effort to do so, however, casts further doubt on the reliability of his testimony.

Dawson did maintain throughout his testimony that he had told Marsack about the ratification meeting on October 5, the day following that meeting. During direct examination he testified that he had placed a call that day to Marsack's office. In fact, Respondent's telephone records do reveal that a call had been placed there at 1:12 p.m. on October 5, a call that lasted 2 minutes. Marsack testified that he had been out of town that day and did not return to his office until October 9. Consistent with that testimony, Dawson testified that, when he had placed his call, he was told by a secretary "that Mr. Marsack was out of town or was unavailable." He testified that he told the secretary, "I needed to talk to him and if she could get ahold of him to have him give me a call." With some uncertainty, Dawson also testified, "I probably told her with regards to W.S. Darley but I'm not certain on that," though "I probably did give her that information."

On "either Thursday afternoon or Friday," Dawson continued during direct examination, he was called by Marsack and, "I informed him that the contract was ratified with the exception of the steward issue. I don't know if I got into exactly telling him it was three and four," and Marsack "became a little upset about that issue." According to Dawson, Marsack "made a comment similar to you can't cherry pick when you have an agreement like that to ratify. You have to take the full agreement and have it ratified by the membership," to which Dawson retorted that it was "my understanding that we didn't and from legal advice we didn't do it." Dawson testified that Marsack "make a comment about when he gets back in town he might have to call Mr. Darley and say that there was no contract in effect because of that." Yet, it should not escape notice that, despite what Dawson supposedly said that day to Marsack about what had been ratified, at no point did he say that Respondent would not execute a contract that included miscellaneous items 3 and 4. As will be seen in section II, infra, that is a particularly significant omission, given the principles that govern ratification under the Act.

Marsack denied that he had any conversation with Dawson, or anyone else from Respondent, between the time of the ratification vote during the evening of October 4 and 9, when he did speak with Dawson. He testified that he had left Wisconsin and

"was in Vermont . . . from the 5th through I think the 9th" of October. In addition to that testimony, and his denial of having called Dawson on October 5 or 6, Marsack presented his firm's telephone bill. It showed that no calls had been made from Marsack's office to Dawson's office or home phone numbers between October 4 and 9. Of course, Marsack had been in Vermont, not in his office, during that period. He testified, however, that when he is not in his office, but makes business calls, "I make all my phone calls through the office."

By way of explanation, Marsack testified, "I call the office and I ring up my secretary and then she makes the call to wherever it is going, and I do that because attorneys do bill for telephone time and without the recording by my secretary I would not have a record of calls made from outside my office." That is not an inherently implausible explanation. And review of his office's bill shows no call placed to any Wisconsin location—particularly, Mondovi where Dawson resides, nor to Eau Claire where Respondent is located, nor to Chippewa Falls where the Employer is located—on October 5 nor, for that matter, on October 6, 7, or 8.

During cross-examination an effort was made to show that Marsack could have returned Dawson's October 5 call by cell phone. As an abstract matter, of course, it would have been possible for Marsack to have done that or, even, to have slipped away to a Vermont pay phone to call Dawson. Yet, the record suggests no reason as of October 5 for Marsack to have chosen to vary his ordinary practice and to place a call to Dawson by cell or pay phone. Nothing in Dawson's account of what he had purportedly told the secretary would naturally have alerted Marsack that, perhaps, he should place a call to Dawson by other than his ordinary procedure. And the absence of a record of such a call on the law firm's telephone records is not the only indicium of unreliability regarding Dawson's testimony about a supposed October 5 telephone call from Marsack.

Dawson's testimony about such a call was contradicted by his own description of such a purported call in his prehearing affidavit. As set forth above, Dawson testified that he had called Marsack's office at 1:12 p.m. on October 5, according to Respondent's telephone records, and that Marsack had returned that call later that same day. But, Dawson related a differing sequence of those events in his prehearing affidavit: "The next morning [after the ratification meeting] I called Marsack and told him that the employees voted to return to work. I told him that the employees did not vote on and did not accept items three and four." Now, his affidavit's account of a "morning" conversation differs from Respondent's telephone record of an afternoon call by Dawson. Moreover, the affidavit account portrays Dawson as having spoken to Marsack when he had purportedly placed that "next morning" call to Marsack. The affidavit makes no mention of Marsack having supposedly returned Dawson's call, as Dawson testified had occurred. Such "evolving versions," *Arnold v. Groose*, 109 F.3d 1292, 1296 (8th Cir. 1997), display changes in a witness's story that inherently undermines the reliability of his testimony. *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1053 (9th Cir. 1998).

Obviously, a call was placed from Respondent to Marsack's office on October 5. However, as Dawson acknowledged, Marsack was not in that office. Given the state of the record, there is no basis for reaching even a relatively firm conclusion as to what may have been said during that 2-minute call. In fact, there is not even a basis for inferring that the call had related to the Employer, as opposed to perhaps some other client of Marsack's, with whom Respondent has a bargaining relationship. Beyond that, there is no credible evidence that Marsack returned such a call from Vermont. I do not credit Dawson's testimony that he related to Marsack so early as October 5 that Respondent had chosen not to submit miscellaneous items 3 and 4 to the ratification vote by the Employer's bargaining unit employees.

There is credible evidence that Dawson did do that on October 9. Before proceeding to recite the testimony about that conversation, certain other events of that date should be described. No one disputed Marsack's testimony that Respondent "never told me [the Employer's employees] were coming back to work without a contract." So far as the record discloses, the strike would be continuing until final agreement was reached on all terms for a collective-bargaining contract. Moreover, no one disputed Marsack's testimony that, during the October 3–4 bargaining session, the parties had agreed that the date for strikers to return to work "was set for October 9th which was the following Monday." In fact, on October 9 the striking employees did report back for work. And there was one significant aspect concerning that return to work.

Newell testified that, during the ratification election, he had told the assembled unit employees that four of their number would not be returning to work, since he was not submitting miscellaneous items 3 and 4 for ratification. He further testified that his participation in that ratification meeting had ended his direct involvement in relations between Respondent and the Employer. Seemingly, Dawson resumed direct involvement for Respondent in those relations. During the hearing I raised the issue of the fate of the four more senior strikers. No one disputed counsel's representation that "[a]ll the four" of them had been returned to work by the Employer. There is no evidence regarding when they returned. But, neither is there evidence that they returned on some date(s) after October 9. In short, there is some basis for inferring that those four more-senior apparatus division strikers had reported along with the other strikers on morning of October 9 and, given the absence of notice to the Employer by then that unit employees had not voted on miscellaneous items 4, had resumed work at the Employer. Only later that same day, testified Marsack, was the Employer informed of Respondent's withholding of miscellaneous items 3 and 4 from unit employees' ratification election.

Marsack testified that he had learned at least about miscellaneous items 3 from Dawson on October 9. He testified that he protested, "[Y]ou don't parse a final offer. You don't grab what you want to grab and then reject what you don't want to submit, that we have an agreement and that agreement includes the language on the resignation." Yet, even that conversation cannot be said to have been Respondent's final word on the agreement reached on October 4.

On October 9, Dawson authored a letter to the Employer that appeared to erase any conception that Respondent did not view the entire agreement of October 4 as having been binding on it,

regardless of how it came to be ratified. In pertinent part, that letter states: "Mr. Darley, I am requesting a list from WS Darley and Company of all employees recalled to work following *ratification of the labor contract* on Wednesday, October 4, 2000." (Emphasis added.) At no point does that letter say anything about reservation of some items from ratification. At no point does that letter say anything about Respondent regarding any portion of the October 4 agreement as not being a binding part of the totality of that agreement.

To the contrary, Dawson confirmed that Respondent regarded the entire agreement as having been ratified in a letter to Marsack dated October 13:

> Mr. Marsack, I am writing in regard to the preparation of the contract ratified by Teamster Local 662 members employed at WS Darley. During the negotiating process the Company's proposals were all printed out when presented to the Union. I would ask that the Company print a draft copy of the contract from your disk and send it to Teamsters Union Local 662 for review. Thank you.

At no point does that letter even suggest that Respondent did not regard any one of "the Company's proposals" as not being included in the contract to be printed out and executed by the parties.

Dawson repeated that message, once again, in a letter dated November 17: "Again, I am asking W. S. Darley to provide a draft copy of the contract our members ratified." At no point does that letter suggest that Respondent did not regard any part of the October 4 agreement as not having been ratified. At no point does that letter suggest that Respondent would not execute a collective-bargaining contract containing all subjects that were included in the totality of the October 4 agreement between the parties.

Perhaps because Respondent filed unfair labor practice charges against the Employer, or perhaps because of the ambiguity of the post-October 13 situation created by Respondent, Marsack never did send a final contract for execution by Respondent until January 8, 2001. That final contract contained the substance of miscellaneous items 3 and 4. Respondent has refused to execute it. And there is no showing that it would have been any more disposed to execute that contract had it been submitted earlier for execution.

II. DISCUSSION

Among other obligations, "execution of a written contract incorporating any agreement reached," is one imposed by Section 8(d) of the Act. The General Counsel alleges that Respondent has failed and refused to comply with that statutory obligation. In fact, the credible evidence reviewed in section I, supra, establishes that final agreement had been reached between the Employer and Respondent during the early hours of October 4. That is, agreement had been reached on all terms for a collective-bargaining contract. Nothing remained to be negotiated or agreed upon, despite Dawson's unreliable effort to portray the situation concerning miscellaneous items 3 and 4 as nothing more than subjects left for consideration. All else aside, it seems unlikely that Newell would have scheduled a ratification election for later on October 4, had Respondent not felt that full and complete agreement had been reached earlier that day. The fact that Respondent did not intend to make an acceptance or rejection recommendation, during that ratification meeting, does not alter or change that conclusion that agreement between the parties had been reached.

Still, Respondent advances essentially two contentions to escape any conclusion that it had reached final and binding agreement with the Employer. First, it points to the fact that even Marsack had regarded the agreement as "tentative" until ratified by a majority of bargaining unit employees. From that, Respondent contends that no final and binding agreement can be said to have arisen until ratification occurred. In that regard, this case presents a somewhat unusual, but not unprecedented, situation. Here, it is not an employer that is defending its refusal to execute a contract based upon some impropriety in a labor organization's ratification of an agreement reached after bargaining. Instead, here it is the labor organization that is defending its own refusal to execute a contract, based upon an asserted impropriety in its own ratification procedures—its own failure to submit the entire agreement reached, for ratification by the employees whom it represents. But, that argument is based upon a faulty premise.

Nothing in the Act imposes an obligation on statutory bargaining agents to obtain employee-ratification of agreements before final and binding agreement occurs and, concomitantly, an obligation arises to execute a contract embodying such an agreement. *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964). To the contrary, as a general proposition, "when an agent is appointed to negotiate a collective-bargaining agreement, that agent is deemed to have apparent authority to bind his principle in the absence of clear notice to the contrary." (Footnote omitted.) *University of Bridgeport*, 229 NLRB 1074, 1074 (1977). See also *Case Mfg. Co. v. NLRB*, 884 F.2d 156 (4th Cir. 1989). Thus, under the Act, employee-ratification is not a condition precedent for formation of final and binding agreement on terms for a collective-bargaining contract.

True, parties can agree that employee-ratification will be a condition precedent for any agreement which they reach to be final and binding. See, e.g., *Hertz Corp*., 304 NLRB 469 (1991); *Sunderland's Inc.*, 194 NLRB 118 fn. 1 (1971). However, there is no evidence of any such agreement here. Respondent acknowledges that there was no agreement with the Employer that employee-ratification would be a condition precedent for formation of a final and binding agreement on terms for a collective-bargaining contract. Instead, there is evidence of no more than Respondent's unilaterally self-imposed ratification requirement. Standing alone, that self-imposed requirement does not create a condition precedent for formation of an agreement under the Act.

Had a majority of the bargaining unit employees voted against ratifying the October 4 agreement, even presented in complete form, all parties seem to agree that Respondent would be under no statutory obligation to execute a written contract embodying that agreement. But, that is not because ratification was a condition precedent to formation of a complete and binding agreement on October 4. "When a union, as here, limits its own authority to enter into a binding agreement . . . by imposing on itself the requirement that its membership ratify the

agreement, that requirement does not constitute a condition precedent." (Citation omitted.) *Williamhouse-Regency of Delaware*, 297 NLRB 199 fn. 5 (1989). Instead, it signifies only that "rights and duties under any agreement reached would not become effective until ratified by the employees." (Citation omitted.) *Tri-Produce Co.*, 300 NLRB 974 fn. 2 (1990). See generally *Sacramento Union*, 296 NLRB 477 (1989). In other words, voluntarily-imposed employee-ratification requirements do not pertain to the agreement portion of Section 8(d) of the Act, but rather pertain to the duties of execution and honoring the terms of agreement, separately imposed by Section 8(d) of the Act.

At first blush, that distinction may seem artificial. Yet, more than superficial consideration reveals that it is a distinction that lies at the core of the overall statutory bargaining obligation. For, it is one that balances statutory concern with encouraging collective bargaining as a means for mitigating and eliminating obstructions to the free flow of commerce, as set forth in Section 1 of the Act, against allowance of democratic participation by employees in the collective–bargaining process. That is, it allows employees to participate more fully in the collective-bargaining process, without compromising unduly the basis principle that "the employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." *General Iron Works Co.*, 150 NLRB 190, 195 (1964), quoted with approval in *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 735 (11th Cir. 1998).

Indeed, to allow employers to "deal with . . . the union through the employees" would be to allow employers to engage in a form of direct dealing with employees, to the detriment of the statutory obligation to deal exclusively with bargaining agents duly selected by those employees. It would be "inherently divisive" and would have the effect of "undermining the authority of the . . . bargaining representatives," *NLRB v. General Electric Co.*, 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970). Were ratification to be compelled, "it would be difficult, if not impossible, for the parties to a collective-bargaining agreement to arrive at a final settlement without the fear of being forced into protracted litigation regarding the union's compliance with its own procedures, clearly a collateral issue." (Footnote omitted.) *M & M Oldsmobile*, 156 NLRB 903, 905–906 (1966), enfd. 377 F.2d 712 (2d Cir. 1967). "The purpose of the statute would be largely frustrated if the results of bargaining must be submitted to a vote of the employees, with all the misunderstandings and cross currents that would inevitably arise in an election of that sort." *NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 88 (4th Cir. 1956).

That is the underlying concern that has led to distinguishing formation of a final and binding agreement, on the one hand, from the statutory duty to execute a contract embodying the rights and duties arising as a result of that agreement, on the other. The distinction preserves employees' ability to participate democratically in the process that leads to agreements governing their terms and conditions of employment. At the same time, it preserves those agreements from challenges based upon "misunderstandings and cross currents," and ensuing "protracted litigation," arising from ratification elections. But, the distinction imposes an obligation on labor organizations conducting ratification elections where, as here, such elections are not agreed-upon conditions precedent for formation of final and binding contracts.

It means that whenever labor organization gives notice to an employer that their agreement has been ratified by the employees, that notice signifies acceptance of the rights and duties arising under that agreement and, in turn, the statutory obligation arises to execute a written contract embodying that agreement. That result is necessary to fully implement the statutory obligation to execute written contracts, while allowing employees to participate in the bargaining process through ratification elections. Employers are not permitted to challenge the results or procedures of those elections: "as a matter of law, it is none of the Employer's business how (or even whether) the Respondent obtains the employees' approval" of an agreement reached between the parties. *Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30, 32 (1990). Employer-awareness of improprieties in ratification elections, failure of a majority of employees to vote in favor of ratification and, even, failure to conduct such a ratification election at all, do not suffice to justify refusals to execute contracts embodying agreements reached, once bargaining representatives give notice that ratification has occurred. See *Newtown Corp.*, 280 NLRB 350, 351 (1986), enfd. per curiam 819 F.2d 677 (6th Cir. 1987). The same considerations warrant the conclusion that once they give notice to employers that ratification has occurred, labor organizations may not, under the Act, brandish deficiencies in ratification elections as escape mechanisms for refusals to execute contracts embodying their agreements.

There is no question that Respondent did given the Employer notice that the October 4 agreements was regarded as having been ratified. To be sure, Dawson did tell Marsack—regardless of whether on October 5 or 9—that miscellaneous items 3, and possibly 4, had not been submitted to the bargaining unit employees for ratification. But, that was no more than notice of possible impropriety in the ratification election conducted by Respondent. On three occasions, in writing, it gave notice to the Employer that Respondent—the statutory bargaining agent and the party with whom the Act obliges the Employer to deal—regarded the October 4 agreement as having been ratified: "following ratification of the labor contract" (October 9 letter); "contract ratified by Teamster Local 662 members" (October 13 letter); "the contract our members ratified" (November 17 letter). There is no evidence that, at any point after October 4, Dawson or any other agent ever notified the Employer that Respondent would not execute a contract containing miscellaneous item 3. Therefore, it was "none of the Employer's business how (or even whether) the Respondent [actually] obtain[ed] the employees' approval" of the entire October 4 final agreement. Respondent clearly communicated that that final agreement had been ratified. In so doing, it effectively communicated its acceptance that is was bound by all rights and duties arising as a result of that agreement. It was statutorily-obliged to execute a written contract embodying that final and binding agreement.

Respondent's second contention, effectively raised in defense to the complaint's allegation, is that miscellaneous item 3 is not a mandatory bargaining subject and, beyond that, is con-

trary to public policy. As a general proposition, under the Act parties can "choose whomever they wish to represent them in formal labor negotiations," and "neither [side] can control the other's selection, a prohibition confirmed in a number of opinions, some of fairly ancient vintage." *General Electric Co. v. NLRB*, 412 F.2d 512, 516–576 (2d Cir. 1969). In short, each party's choice of bargaining agents is not encompassed by "wages, hours, and other terms and conditions of employment," about which bargaining is mandated by Section 8(d) of the Act. Choice of bargaining agents is not a mandatory subject of bargaining under the Act.

Nonetheless, parties are free under the Act to propose and bargain about nonmandatory or permissive subjects of bargaining. Further, nothing in the Act prohibits them from striking agreements regarding those subjects and from, then, including those agreements as part of overall agreements on terms for collective-bargaining contracts. To be sure, such agreements do not confer upon the Board jurisdiction to compel parties to honor portions of agreements concerning nonmandatory or permissive bargaining subjects. *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 (1988), affd. sub nom. *North Bay Development Disabilities Services v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), cert. denied 498 U.S. 1082 (1991). But, the Board is not the only venue for disposition of contractual disputes. To worry about enforcement at this stage is to put the cart before the horse. A proper prelude to enforcement proceedings is a written contract embodying the final agreement reached between the parties. In turn, that written contract serves as the predicate for any subsequent proceedings.

Miscellaneous items 3, as well as 4, was an integral component of the total agreement reached between the parties. Respondent did not want to leave four more senior apparatus division strikers out of work, while four less-senior crossovers continued to work in that division. The Employer was unwilling to lay off the four less senior crossovers, but lacked work for eight employees. Obviously, striker-return to work is a mandatory bargaining subject. Eventually, agreement was reached for the four more senior strikers to return to work, along with the four crossovers, even though there was insufficient work for eight apparatus division employees. That benefit was secured by Respondent in direct return for its agreement that the four employee-committee members would resign their positions and not again hold union office while employed by the Employer. That agreement was inextricably enmeshed with the one pertaining to the four more senior striking apparatus division employees. In consequence, while continued holding of union office, in isolation, is no more than a nonmandatory or permissive bargaining subject, viewed in conjunction with the strike return issue, the permissive subject became an integral component of agreement on a mandatory bargaining subject. In turn, that agreement became the capstone for final agreement on the totality of agreement on terms for a collective-bargaining contract.

Respondent attempts to evade that conclusion by arguing that it cannot be said that the four employee-committee members had effectively waived their statutory right to hold union office. Of course, it is accurate that "the right to assist a union by holding union office is protected by Section 7 of the Act," *Bethenergy Mines*, 308 NLRB 1242, 1244 (1992), and that right is one that affects nonoffice holding members of the bargaining unit, as well. For, where election is an option made available, all employees in a bargaining unit have the statutory right to elect "the representative[s] of their choice." *Sheet Metal Workers v. Lynn*, 488 U.S. 347, 355 (1989). Nothing in the Act, however, prevents employees from waiving statutory rights, certainly ones that affect them personally.

The substance of miscellaneous items 3 was orally presented to Newell and Gegare on October 4. Those two union officials conveyed the substance of that oral proposal to the four employee-committee members. According to Newell, the four members eventually "said that they might be . . . inclined to at least consider it but they insisted that they wanted it in writing." That request was conveyed to the Employer. The benefits of computer technology made it possible for the Employer to promptly comply. A written proposal was prepared and submitted to Respondent and, in turn, was shown to the four employee-committee members. Secretary-Treasurer Newell admitted that the four "agreed and said well, I guess . . . we can live with this," thereby agreeing to the substance of that written proposal.

No one contends that Mawby, Fransway, Schnick, and Wannish, or any one of them, were incapable of comprehending the oral and written word. Certainly, there is no evidence even suggesting that any one of them had been uncertain about what was being proposed and, moreover, about what they were agreeing to do, in return for the Employer's agreement on return to work of four of their striking colleagues and as the capstone for total final agreement on terms for a collective-bargaining contract. In sum, the evidence establishes that the four employee-committee members clearly understood the proposal and unmistakably agreed to accept the substance of that proposal. To somehow apply waiver principles to their agreement and, more importantly, to conclude that waiver standards were not satisfied in those circumstances, would undermine the statutory policies seeking to foster collective bargaining, as a means for mitigating and eliminating the free flow of commerce.

One further point should be noted in connection with miscellaneous item 3. While it involves a permissive subject of bargaining and a statutory right of employees, it is not a violation of the Act for a labor organization to remove an employee from union office, nor to bar an employee from holding union office. *Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118 (2000). See generally *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000). So far as the evidence discloses, removal of Mawby, Fransway, Schnick and Wannish as committee members did not affect, in any manner, their continued employment with the Employer. Nor did it affect access to the Board of any one of them. Furthermore, neither their employment nor access to the Board was affected in any manner, so far as the evidence reveals, by continued disallowance to hold union office for the remainder of each's employment by the Employer.

Any argument that removal from office, and disallowance to again hold office, might somehow offend public policy encounters a problem, given the facts adduced during the hearing. In

Bethenergy Mines, supra, the Board held that "it was not arbitrary . . . to seek to prohibit employees who had blatantly ignored the contract from holding union positions that required the occupants directly to deal with management for the duration of the contract." (Citations omitted.) 308 NLRB at 1245. Here, there is no basis for inferring that any one of the four employee-committee members might go so far as to "blatantly ignore the contract," but there is some basis for concluding that the four of them had engaged in conduct in contravention of their obligation to act as employee-representatives for all unit employees and to engage in good-faith bargaining for a collective-bargaining contract.

Marsack had told Respondent that for "the first month or six weeks or . . . the first few meetings," hostility on the part of the employee-committee "had to be massaged and worked around even to get to . . . . some constructive bargaining," a sentiment which might well be expressed by an employer confronted with hard bargaining by an employee-committee. Yet, other unit employees made similar expressions during a meeting with Respondent's officials: "that the committee was operating more on its personal agenda instead of representing the total interest of the group," as described in section I, supra. Moreover, when confronted with the Employer's oral proposal that became miscellaneous item 3, rather than address it on its merits, the committee wanted it in writing for no reason other than so that, as Mawby put it, "he could sue" the Employer's negotiator, Marsack. Finally, the entire employee-committee agreed to that proposal, by then reduced to writing. Yet, two of them later attempted to retract their agreement, thereby attempting to nullify the final binding agreement reached little more than 12 hours earlier. In the process, their abrupt mind-changes, on the part of employees who had been occupying the position as representatives of all unit employees during bargaining, placed in jeopardy an entire agreement for a collective-bargaining contract and, as well, subjected Respondent to the costs of litigation during which the entire bargaining unit has been left without benefit of the agreement negotiated supposedly on behalf of all of them. In short, there is some basis for concluding that Respondent had a statutorily-countenanced basis for removing Mawby, Fransway, Schnick, and Wannish from union office, pursuant to the agreement with which those four employees had agreed and which represented the capstone of an entire collective-bargaining contract.

CONCLUSION OF LAW

The Respondent, General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO, had committed an unfair labor practice affecting commerce by failing and refusing to sign a written collective-bargaining contract, embodying the final and binding agreement reached with W.S. Darley & Company on October 4, 2000—as the exclusive collective-bargaining agent of all regular full-time and regular part-time production and maintenance employees employed by W.S. Darley & Company at its Chippewa Falls, Wisconsin facilities; excluding managerial employees, professional employees, office clerical employees, guards and supervisors as defined by the Act—in violation of Section 8(b)(3) of the Act.

REMEDY

Having concluded that General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to execute, upon request by W.S. Darley & Company, a written contract embodying the entire agreement reached with that employer on October 4, 2000.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO, Eau Claire, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to execute a written collective-bargaining contract embodying all terms included in the final and binding agreement reached with W.S. Darley & Company on October 4, 2000, as the representative of all employees in the following appropriate bargaining unit:

> All regular full-time and regular part-time production and maintenance employees employed by W.S. Darley & Company at its Chippewa Falls, Wisconsin facilities; excluding managerial employees, professional employees, office clerical employees, guards and supervisors as defined by the National Labor Relations Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) On request, execute a collective-bargaining contract with W.S. Darley & Company that embodies all terms included in the final and binding agreement reached with that employer on October 4, 2000, for all employees in the appropriate bargaining unit set forth in paragraph 1(a) above.

(b) Within 14 days after service by the Region, post at its offices, places of business, and meeting places copies of the attached notice marked "Appendix."[3] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL–CIO and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by it en-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by W.S. Darley & Company, if willing, at all locations where notices to its employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps it has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute a written collective-bargaining contract embodying all terms included in the final and binding agreement we reached with W.S. Darley & Company on October 4, 2000, as the representative of all employees in an appropriate bargaining unit of:

> All regular full-time and regular part-time production and maintenance employees employed by W.S. Darley & Company at its Chippewa Falls, Wisconsin facilities; excluding managerial employees, professional employees, office clerical employees, guards and supervisors as defined by the National Labor Relations Act.

WE WILL, on request by W.S. Darley & Company, execute a written collective-bargaining contract embodying all terms included in the final and binding agreement we reached with that employer on October 4, 2000.

GENERAL TEAMSTERS UNION LOCAL 662, AFFILIATED WITH INTERNATIONAL BROTHER-HOOD OF TEAMSTERS, AFL–CIO